U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: AUG 14 2006

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IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition will be approved.

The petitioner is a university. It seeks to employ the beneficiary permanently in the United States as an assistant professor of finance pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, an ETA Form 9089 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a doctorate *as of the priority date.*

On appeal, the petitioner submits evidence regarding the date his degree was conferred. This evidence overcomes the director's legitimate concerns.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The petitioner must demonstrate the beneficiary's eligibility as of the priority date, the day the Form ETA 9089 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d); 8 C.F.R. § 103.2(b)(12); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In this matter, the priority date is August 8, 2005.

Decisions by federal circuit courts, which are binding on this office, have upheld our authority to evaluate whether the beneficiary is qualified for the job offered.

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). *See also Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *Black Const. Corp. v. INS*, 746 F.2d 503, 504 (9th Cir. 1984); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984). The court in *K.R.K Irvine* relied on an amicus brief from the DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *K.R.K. Irvine, Inc.*, 699 F.2d at 1009.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole. Regarding the minimum level of education and experience required for the proffered position in this matter, Part H, line 4, of the labor certification reflects that a doctorate is required.

The petitioner submitted the beneficiary's official academic transcript from Michigan State University printed on July 8, 2005. The document provides that the beneficiary completed her comprehensive exam on May 10, 2002 and her final examination on June 27, 2005. Although printed on July 8, 2005, the transcript further reflects that the beneficiary's Ph.D. degree was "granted" on August 18, 2005.

The director concluded that the beneficiary had not been granted her Ph.D. until August 18, 2005, ten days after the date of filing, and denied the petition.

On appeal, counsel notes that the transcript was printed on July 8, 2005. The petitioner resubmits a copy of the official transcript, highlighting that fact. The petitioner also submitted the following:

1. An October 31, 2005 letter from Michigan State University addressed "To Whom it May Concern," advising that the beneficiary received a Ph.D. on July 8, 2005, when "the final degree requirement was complete." The letter further explains that the "graduation date" for the diploma and transcript is August 18, 2005, the last date of the semester.

2. An October 28, 2005 "Certification of Degree" reflecting that a Ph.D. "was conferred" on the beneficiary on July 8, 2005.

3. An e-mail notice dated July 14, 2005 from the Office of the Registrar to the beneficiary advising that the university "has conferred your degree." The e-mail notice continues: "Effective immediately, any transcript that you request will include your degree title and date."

The new evidence clearly establishes that Michigan State University conferred a Ph.D. on the beneficiary on July 8, 2005, prior to the petition's priority date.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden.

ORDER: The decision of the director is withdrawn. The appeal is sustained and the petition is approved.